IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 73-1421

JESSE L. SMITH, PETITIONER

versus

ILLINOIS CENTRAL RAILROAD COMPANY, INTERNATIONAL PAPER COMPANY, and AMERICAN MOTORISTS INSURANCE COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jesse L. Smith, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

When this case was tried to a jury, resulting in a verdict

in favor of the defendants, and against the petitioner, the District Court entered judgment in accordance therewith, without written opinion. The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the judgment is reported at 486 F. 2d 943 (5 Cir. 1973), (Appendix "A," infra, pp. 11-15)

JURISDICTION

The denial of the Petition for Rehearing and Rehearing en Banc was entered on January 10, 1974 (Appendix "B," infra at p. 16) and is reported at 486 F. 2d 1055 (5 Cir. 1974). The jurisdiction of this court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. In a case brought under the Federal Employers Liability Act does an instruction on unavoidable accident constitute reversible error when negligence on the part of the railroad has been shown?

2. Can an appellate court affirm a finding of no liability on the part of the railroad on the basis of a possible inference that the principal cause of the accident was inevitable jerking of railroad cars in a switching operation?

STATUTE INVOLVED

Federal Employers Liability Act, 45 U.S.C. Sec. 51 et seq.

STATEMENT

Plaintiff's severe injuries, culminating in the amputa-

tion of his right leg after a load of pulpwood fell on him from railroad car number 1670, were sustained on March 26, 1970, on the spur track located on premises owned by International Paper Company in Wilkinson County, Mississippi. At that time, plaintiff was employed by the Illinois Central Railroad Company as a conductor on a train making a run from Baton Rouge, Louisiana, to Vicksburg, Mississippi.[1]

When the train reached the International Paper Company spur track, it began switching operations necessary to pick up cars loaded with pulpwood. Plaintiff had bills of lading on two cars which were ready for shipment; these two cars were located on either side of car number 1670. Car number 1670 was not going to be picked up as it was not ready for shipment,[2] and it would have to be switched back on to the spur track.

Negligence shown on the part of the railroad consisted of the manner in which the switching operation was carried out, and the failure to supply plaintiff with a walkie-talkie. With respect to the first course of negligent conduct, Mr.

1. Plaintiff alleged that the defendant railroad breached 45 U.S.C. Sec. 51 et seq by failing to provide him with a safe place to work; failing to provide him with proper communications equipment, and in moving the train at an excessive speed after an unsafe coupling maneuver. International Paper Company was sued under the laws of Mississippi which provide for comparative negligence (Miss. Code, Title 10, Sec. 1454), and was alleged to have been negligent in the manner in which the pulpwood car was loaded, in failing to maintain the track in proper condition so as to avoid excessive rocking of the pulpwood cars. The railroad filed a cross complaint against International Paper Company, and both defendants pleaded contributory negligence and assumption of risk.

2. Bundles of pulpwood approximately sixty-four inches in length were placed first on one side of the railroad car, the bottom of which sloped slightly toward the center in a groove. After all of the first half was properly aligned, the other half of the car was loaded and then the sides of the wood were "bumped" by a pad on the loader to push them in securely (App. 172). Car number 1670 had been bumped, but not yet "topped," which involves making wood at the top of the railroad car level (App. 176).

Claude Williams, brakeman, instructed the engineer to commence backing up through a walkie-talkie provided him. He recalled that some of the wood on car number 1670 was not even, and therefore, the car should have been moved more slowly than ordinarily. Nevertheless, Mr. Williams did not remember advising the engineer that such precautions were needed despite his acknowledgment that he should have done so.

The first attempt at the coupling maneuver was unsuccessful, and a second try was made. Both of these couplings were accompanied by a loud bang, characterized as being louder than usual by Ralph Smith, International Paper Company employee. Following this unusually hard coupling, Mr. Smith stated the train moved out faster than ordinarily.

After giving the signal to the engineer to move forward, Mr. Claude Williams caught on to the side of the second or third car from number 1670. Because plaintiff had no walkie talkie, he had to ride out to the main line with Williams on the train. Had plaintiff been furnished with such a communications device, there would have been no need for him to catch on to the side of car number 1670 and proceed to the main line in order to direct the switching operations on the scene.

As the train moved forward approximately eight car lengths, the pulpwood on car number 1670 began rolling off the east side of the car, striking plaintiff repeatedly until he could no longer hold on to the grab irons. He swung himself away from the train to avoid falling under the wheels, and dropped to the ground.

Negligence on the part of International Paper Company arose from the manner in which the wood was stacked in car number 1670. Ralph Smith, a loader for International Paper Company, examined photographs offered in evidence of car number 1670 after the accident, and stated that there had been an overlapping condition of the wood which should have been corrected immediately. Failure to make such corrections would be improper loading according to this witness. To the same effect is the testimony of Mr. B. L. Davis, a railroad employee, who testified that overlapping would result in the wood falling over.

Plaintiff moved for a directed verdict at the close of his case, and at the close of all of the evidence.

The court's charge to the jury was objected to by plaintiff on these grounds: failure to give instructions requested by plaintiff; instructions on intervening cause and unavoidable accident should not have been given since they were without evidentiary basis; failure to apprise the jury in a clear manner of the application of comparative negligence under F.E.L.A. and the substantive law of Mississippi.

The jury found no negligence on the part of either of the two defendants or the plaintiff,[3] leaving unavoidable accident as the only possible explanation for the accident. Plain-

3. The jury's verdict reads in pertinent part:
"We, the jury, find:
1. Was Illinois Central Railroad guilty of negligence? NO
2. If so, did its negligence contribute in whole or in part to plaintiff's injuries? NO
3. Was International Paper Company guilty of negligence? NO
4. If so, was its negligence a proximate cause of plaintiff's injuries? NO
5. Was plaintiff guilty of negligence? NO
. . . . ." (App. 543-544)

Claude Williams, brakeman, instructed the engineer to commence backing up through a walkie-talkie provided him. He recalled that some of the wood on car number 1670 was not even, and therefore, the car should have been moved more slowly than ordinarily. Nevertheless, Mr. Williams did not remember advising the engineer that such precautions were needed despite his acknowledgment that he should have done so.

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As the train moved forward approximately eight car lengths, the pulpwood on car number 1670 began rolling off the east side of the car, striking plaintiff repeatedly until he could no longer hold on to the grab irons. He swung himself away from the train to avoid falling under the wheels, and dropped to the ground.

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tiff's motion for judgment n.o.v., and in the alternative, for new trial was denied. Following appeal, the Court of Appeals for the Fifth Circuit, affirmed the judgment, and denied the Petition for Rehearing and Rehearing en Banc.

REASONS FOR GRANTING THE WRIT

This case presents important issues regarding the burden of proof imposed on an employee invoking the Federal Employers Liability Act. Plaintiff's theory of the case was that negligence on the part of the railroad concurred with omissions by the International Paper Company; each of the defendants sought to cast blame on the other. At no time during the trial of this matter was the defense of unavoidable accident ever raised until such an instruction was given by the lower court.

Nevertheless, the appellate court held there was evidence to support the instruction on the following basis:

> "In the first place there was specific evidence tending to show that the accident was or could have been unavoidable: the brakeman and the engineer of the train both testified that in similar operations there was always slack between the cars, and that a certain amount of jerking was therefore inevitable. It could have been **inferred** from that testimony that in that particular operation in question, the **principal reason** the wood had fallen was that it had been shaken loose by the inevitable jerking during the operation." (Emphasis supplied)
>
> *Smith v. Illinois Central Railroad Company, supra*, at p. 945-946. (Appendix "A," at p. 14.)

In contrast to inferential evidence, there was positive

evidence that the railroad car was not properly loaded by International Paper Company (Smith, App. 233), and that this condition could cause the wood to fall over (McDavid, App. 415). Moreover, there was an admission on the part of a railroad employee that he knew the railroad car was not ready for shipment, and therefore, it should have been moved more slowly; nevertheless, he failed to advise the engineer that such precautions were necessary (Williams, App. 143). Petitioner submits that the appellate court's inferring a principal cause of the accident is at variance with the facts adduced and the jurisprudence applicable thereto. Of greatest importance is the court's failure to explain why the railroad is not liable if its negligence played ". . . any part, even the slightest . . . ," *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506 (1957), in bringing about the accident. Nowhere is any reason given for this time honored standard being changed to the employer's negligence being the principal cause.

In the case at bar, the defendants did not make out such proof; on the contrary, the instruction was given **at the instance** of the trial court. On appeal, when the court reviewed the record for evidence of a cause qualifying as an unavoidable accident, the most the court could say was that "It could be inferred . . ." that slack between the cars resulting in jerking was a principal reason. Petitioner urges that this finding is inconsistent with applicable jurisprudence, particularly the statement in *Page v. St. Louis Southwestern Railway Company*, 349 F. 2d 820 (5 Cir. 1965), at p. 825:

> "Following again faithfully our admonition that 'ordinarily in [an FELA] case * * * a charge of unavoidable accident is confusing and tends to distract the jury's

attention from the simple issues,' 312 F. 2d 84, 93, the Trial Judge declined, over objection of the Railroad to submit a definitive issue on unavoidable accident. We fully approve. Experience demonstrates that in a charge properly structured, there is no need for it and hence no place for one."

When there is no affirmative proof of a cause other than the negligence of the defendants, and there is only a mere possibility of unavoidable accident situation, such an instruction cannot be given, *Downs v. American Employers Insurance Company*, 423 F. 2d 1160 (5 Cir. 1970) (reversing a jury verdict); *Franklin v. Delgado*, 262 F. 2d 439 (5 Cir. 1959). Such an instruction has been repudiated when the accident was shown to be the result of negligence on the part of one or more parties, *Auto Transports, Inc. v. Hinman*, 332 F. 2d 553 (10 Cir. 1964); *Chesser v. Casey*, 284 F. 2d 72 (5 Cir. 1960). As explained by *Fulton v. Shaw*, 321 F. 2d 545 (5 Cir. 1963), at p. 546: "We think it was necessary **for the defendant** to establish some theory of cause of the accident which excluded the negligence of the parties." (Emphasis supplied)[4]

CONCLUSION

The net effect of the jury verdict was to find that this accident had no cause other than that which was beyond the reach of either of the two defendants. The action taken by the trial court in supplying a theory of the case never envisioned by any of the parties—unavoidable accident—and affirmed by the appellate court, has significant implications

4. This is the majority rule as illustrated by the many cases collected in Anno., 65 A.L.R.2d 12, at pp. 32-34, as well as in the supplements to this annotation.

for all future litigants under the Federal Employers Liability Act. Not only is the concept of the employer's liability for any contributing negligence eroded, but the highly questionable defense of unavoidable accident is abused by application to a situation where it could not possibly obtain. It is for these reasons that petitioner prays that the writ be granted.

Respectfully submitted,

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Attorneys for Jesse L. Smith, Petitioner

PROOF OF SERVICE

I, H. Alva Brumfield, III, attorney for petitioner, and a member of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on Boris F. Navratil, Esquire, of the firm of Breazeale, Sachse & Wilson, 701 Fidelity National Bank Building, Baton Rouge, Louisiana 70801, and Roger M. Fritchie, Esquire, of the firm of Durrett, Hardin, Hunter, Dameron & Fritchie, 614 Louisiana National Bank Building, Baton Rouge, Louisiana 70801, counsel for respondents.

Baton Rouge, Louisiana, this ____ day of March, 1974.

H. ALVA BRUMFIELD, III

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3378

JESSE L. SMITH,

Plaintiff-Appellant,

versus

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana

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(November 13, 1973)

Before WISDOM, GEWIN and CLARK,
Circuit Judges.

PER CURIAM: This is an action for damages brought by the plaintiff-appellee Jesse L. Smith against his employer, the Illinois Central Railroad Company, the International Paper Company, and the Paper Company's insurer, American Motorists Insurance Company, to recover for injuries he suffered while riding on the side of a railroad car filled with pulpwood. The accident occurred at one of the Paper Company's woodyards. The trial court entered judgment for the defendants after the jury returned verdicts based on special interrogatories finding that neither the Paper Company nor

the Railroad had been guilty of negligence; nor had the plaintiff been guilty of negligence. We affirm.

Smith was the conductor on an Illinois Central train making a run from Baton Rouge, Louisiana, to Vicksburg, Mississippi. On March 26, 1970, the train stopped at the Paper Company's yard in Centreville, Mississippi, to pick up several freight cars loaded with pulpwood which were ready for shipment to the company's mills near Vicksburg. Such cars are "wood racks" in railroad vernacular. The plaintiff's injury occurred while the train was performing the switching operations necessary to connect the wood racks to the rest of the train. In performing those switching operations, the engineer had to drive the train's engine onto a siding paralleling the main line, where the wood racks were loaded and where they stood while awaiting shipment. The train had to be coupled with the wood racks on the siding track. After the coupling, the cars were driven to the main track, where they were to be connected with the rest of the train.

Smith's injury occurred after the train had been coupled with the wood racks and was on its way to the main line. When the train had moved eight or ten car lengths after the coupling, pulpwood logs began to fall off the top of one of the wood racks. The plaintiff was riding by holding on to the grab irons on the leading end of the car immediately following the car from which the wood was falling. When the falling wood began to strike Smith, he jumped from the train, swinging out to avoid falling under the wheels. He suffered a broken pelvis and leg injuries which required the amputation of his leg.

The plaintiff raises six issues on appeal. The first two concern the sufficiency of the evidence: first, the plaintiff argues that the trial judge should have granted him judgment notwithstanding the verdict and, second, that failing a grant of judgment n.o.v., the trial judge should have granted

his motion for a new trial. Upon a review of the record as a whole, we find that the evidence was sufficient to support the jury's findings that none of the three parties involved had been negligent. See *Boeing Company v. Shipman*, 5 Cir. 1969, 411 F.2d 365. We therefore find the trial judge properly denied the motions for judgment n.o.v. or, in the alternative, for a new trial.

The plaintiff's other four objections all concern the trial judge's charge to the jury. The first is a challenge to the judge's instruction on unavoidable accident.[1] The

[1]The trial judge's charge was, if anything, unfavorable to the defendants, especially to the railroad company. In denying the plaintiff's post-trial motions, the trial judge observed: ". . . I don't suppose there was any portion of the charge of this court that had more emphasis or was more emphasized than that the railroad could be held liable if they were found to have contributed in any way whatsoever, even in the slightest, to this accident." The charge concerning the railroad's liability was repeated not less than *five times*. In instructing the jury on the question of the railroad's liability the trial judge said ". . . he [plaintiff] must prove that negligence on the part of the railroad which he asserts, contributed in whole or in part, even the slightest, to his injuries." Later, he charged: "The difference between the two defendants is that under what we call the FELA — the Federal Employers Liability Act — the railroad who is governed by that Act, is held liable if their negligence contributed even the slightest to the accident . . ." The third time the judge stated: "Going back, for a moment, if there is negligence on the part of the railroad and if it contributed in whole or in part, even the slightest, to the accident, you must find them guilty of actionable negligence."

It was after this third repetition, inviting the jury to find the railroad liable to the plaintiff if its negligence, even the slightest, contributed to the plaintiff's injuries, when the court informed the the jury that the mere occurrence of the accident did not mean that anyone was negligent, as sometimes accidents happen which are inevitable. At two other points in the charge the trial explained the plaintiff's rights of recovery against the railroad "if you find that its negligence played any part, however small, in causing plaintiff injury."

After properly explaining "unavoidable accident," the trial judge did not err in adding:

> ". . . Lastly, in connection with negligence and proximate cause the mere happening of an accident does not necessarily mean that someone is negligent. In law we recognize what are termed unavoidable or inevitable accidents. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been caused by negligence, even though such accident should have been avoided by the

plaintiff argues that there was no evidence in the record to support this instruction. We cannot agree. In the first place, there was specific evidence tending to show that the accident was or could have been unavoidable: the brakeman and the engineer of the train both testified that in similar operations there was always slack between the cars, and that a certain amount of jerking was therefore inevitable. It could have been inferred from that testimony that in the particular operation in question, the principal reason the wood had fallen was that it had been shaken loose by the inevitable jerking during the operation. Both the brakeman and the engineer testified that there were no harsh couplings and that the entire switching operation was smooth and void of any "bangs" or irregularities. Three other witnesses testified that they saw nothing unusual and heard nothing unusual. It is significant too that the plaintiff never settled on a specific theory of how the accident had happened. In his complaint and throughout the trial the plaintiff attributed the accident to any of a number of causes, including (1) the negligence of the engineer in operating the train at too fast a speed after the coupling operation; (2) the negligence of the Paper Company in failing properly to maintain its track; (3) the negligence of the Paper Company in failing to load the wood racks properly. There was no substantial proof that any of these possible causes had in fact caused the accident, and the plaintiff in making his case constantly shifted ground in trying to fix liability for his injury on one or the other of the defendants. It was as plausible to find the accident a result of unavoidable causes

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exercise of exceptional foresight, skill or caution, still no one may be liable for injuries resulting from it."

Again:

". . . It was possible for you to find that neither of the defendants was guilty of negligence at all. You may find that the plaintiff was the only one negligent. You may find that the plaintiff was not guilty of negligence. You may find that only the paper company was guilty of negligence and proximate cause, or you may find that the railroad was guilty of negligence which contributed in some way to the accident."

as it was to find the accident the result of any of the alternative causes cited by the plaintiff. Consequently, we cannot say that the record did not support the trial judge's instruction on unavoidable accident.

The plaintiff's other three objections to the charges are without merit. The second objection is to the trial judge's instruction on intervening cause, and the third is to his instructions on contributory and comparative negligence. With respect to both of these instructions, it is clear that even if the instructions were erroneously given, they could not have prejudiced the plaintiff. The jury would have needed to consider those two instructions only if it had first found one or the other of the defendants negligent. Since its verdict was on special interrogatories to the effect that neither of the defendants was negligent, it is clear that the jury had no reason to consider the challenged instructions.

The final challenge is to the failure of the trial judge to instruct the jury on the Federal Safety Appliance Act, 45 U.S.C. § 2 (1970). We find no error in the judge's action in this regard. There was no evidence in the record supporting the conclusion that the railroad had violated the Federal Safety Appliance Act.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Bastida v. Henderson	73-2399	1/14/74	E.D.La., 487 F.2d 860
Hazeltine v. U. S.	73-2019	1/16/74	N.D.Tex., 486 F.2d 219
Lancer v. U. S.	73-2087	1/14/74	N.D.Fla., 486 F.2d 1400 361 F.Supp. 129
NMS Industries, Inc. v. Premium Corporation of America, Inc.	73-1869	1/10/74	N.D.Miss., 487 F.2d 292
Robinson v. Jefferson County Board of Education	73-2134	1/10/74	N.D.Ala., 485 F.2d 1381
Smith v. Illinois Central Railroad Company	72-3378	1/10/74	M.D.La., 486 F.2d 943
U. S. v. Leigh	73-1615	1/11/74	W.D.Tex., 487 F.2d 206

U. S. v. Manning	73-2290	1/17/74	M.D.Fla., 486 F.2d 1402
U. S. v. Nuccio	73-2416	1/16/74	E.D.La., 487 F.2d 462
Vessi v. U. S.	73-2216	1/16/74	W.D.Tex., 486 F.2d 1402

MICHAEL RODAK, JR., CLERK

IN THE

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Number 73-1421

JESSE L. SMITH, PETITIONER

versus

ILLINOIS CENTRAL RAILROAD COMPANY, INTERNATIONAL PAPER COMPANY, and AMERICAN MOTORISTS INSURANCE COMPANY

OPPOSITION BRIEF OF INTERNATIONAL PAPER COMPANY AND AMERICAN MOTORISTS INSURANCE COMPANY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

Number

JESSE L. SMITH, PETITIONER

versus

ILLINOIS CENTRAL RAILROAD COMPANY, INTERNATIONAL PAPER COMPANY, and AMERICAN MOTORISTS INSURANCE COMPANY

OPPOSITION BRIEF OF INTERNATIONAL PAPER COMPANY AND AMERICAN MOTORISTS INSURANCE COMPANY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

International Paper Company and American Motorists Insurance Company pray that the petition of Jesse L. Smith, plaintiff, for the issuance of writ of certiorari to review the

judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case be denied.

QUESTIONS PRESENTED FOR REVIEW

1. As to International Paper Company and American Motorists Insurance Company, sued only in tort, does an instruction on unavoidable accident constitute reversible error when there is substantial evidence to support it?

2. Can an appellate court affirm a finding of no liability on the part of International Paper Company and American Motorists Insurance Company, sued only in tort, when the evidence preponderates in favor of a finding of no negligence?

STATUTE INVOLVED

There is no Federal Statute involved as regards the claim against either International Paper Company or American Motorists Insurance Company.

STATEMENT OF THE CASE

Plaintiff, Jesse L. Smith, brought this action for damages sustained while he was employed by Illinois Central Railroad Company as a conductor aboard one of its freight trains in Centerville, Mississippi. Named as defendants were his employer, Illinois Central Railroad Company, and International Paper Company and its insurer, American Motorists Insurance Company. Appellant's action against Illinois Central Railroad Company is brought pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51, et seq. Appellant's action against

International Paper Company and American Motorists Insurance Company is in tort only and is based upon diversity jurisdiction, 28 U.S.C. § 1332.

Plaintiff alleged in his complaint, and there is no dispute in the record, that he sustained physical injury when he was struck by falling pulpwood as he was riding on the side of a pulpwood car on an Illinois Central Railroad Company freight train in Centerville, Mississippi. At that time the train, on which Appellant was the conductor, was performing certain "switching" operations in order to pick up and transport from Centerville certain pulpwood cars which had been loaded by the employees of International Paper Company at its Centerville woodyard. (App. 94, 121-124, 158-159, 256-259).

The case was regularly tried against all defendants and submitted to the jury which determined that there was no negligence on the part of either International Paper Company or Illinois Central Railroad Company. The jury further determined that there was no negligence on the part of plaintiff. (App. 514-516, 543-544). Counsel for plaintiff as well as counsel for both defendants, International Paper Company and Illinois Central Railroad Company, moved for directed verdicts at the close of petitioner's case. (App. 354-361). Similarly, both counsel for petitioner and counsel for defendants moved for directed verdicts at the conclusion of the trial. Subsequently petitioner moved for a judgment n.o.v., and in the alternative, for a new trial.

Following appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment and denied the Petition for Rehearing filed by petitioner.

ARGUMENT

It must be remembered that as between petitioner and these defendants there is no issue of nor application of the Federal Employers Liability Act. This is a simple suit in tort based upon diversity of citizenship as to those parties.

In that connection instructions on intervening cause and unavoidable accident were appropriate. Indeed under the evidence presented those instructions were necessary.

The statement made in petitioner's Petition for Writs, in the first paragraph on Page 5 thereof, is misleading. Neither witness Smith nor witness Davis testified that an overlapping condition existed prior to the accident, nor that it caused the accident.

One photograph introduced in evidence, in the mind of counsel for plaintiff, tended to show an overlapping condition. However, other photographs (offered in evidence) do not reflect this. All of these photographs were taken after the accident.

Furthermore, the testimony indicates that there was no overlap. Mr. Ralph Smith testified that he found none after the accident. (App. 233-234). The plaintiff, Mr. Jesse Smith, testified that prior to the accident, the wood appeared to be evenly aligned down the middle of the car. Witness Davis, the Illinois Central car inspector who inspected the scene on the day after the accident, admitted that he made no mention of any alleged overlap in his report which was compiled that

day nor had he mentioned any such alleged condition in his deposition prior to trial. (App. 427-428).

Appellant attacks the Trial Judge's charge in several respects. The first concerns the charge given by the Trial Judge on "unavoidable accident." Appellant does not question the correctness of the charge as given, but rather, denies that there was any evidentiary basis for giving the charge at all. This is simply incorrect. There was a great deal of evidence which the Jury might well have believed tending to show that the accident did not result from the fault of anyone and this evidence was argued by counsel for both defendants during their closing arguments. Certainly an unavoidable accident is not merely an accident caused by an act of God. An accident is also unavoidable or inevitable "when all precautions reasonable to be required have been taken, and the accident has occurred notwithstanding." *Atkins v. Lorentzen*, 328 F.2d 66, 69 (5th Cir. 1964). There was specific evidence to the effect that no matter how carefully the switching operation is performed a certain amount of jerking and bumping is inevitable. By definition, in order to couple these cars they must be pushed into one another, be it ever so slowly. Further, as the testimony reveals, no matter how slowly or carefully a train pulls out the mere fact that slack is present between the individual cars which make up the train will cause a certain amount of jerking. (App. 97-99, 105, 126, 130, 132-134, 153). These are simply unavoidable risks attendant to the very business of railroading. Appellant himself admitted that he had no knowledge of what caused the accident and could not point the finger of blame at any one person or point out any particular thing that had been done wrong. (App. 384-386).

The Jury in this case was certainly entitled, and in fact, was under an obligation to consider all the evidence regarding the loading and switching operation. The Jury was entitled to find from this evidence as a whole that appellant did not prove fault on the part of anyone. Further the Jury could have very well concluded that this accident was the result of an acceptable risk considering the nature of the work being performed. Certainly in the type of operation involved here there always exist risks which no amount of care can remove. They are simply inherent in the process itself. The Jury had ample evidence before it to determine that the International Paper Company employees used all reasonable precautions.

Finally, plaintiff is clearly in error in stating (Petition for Writs, page 6) that at no time during the trial was the defense of unavoidable accident raised.

Negligence on the part of each and all defendants was denied in their respective pleadings. This same theory was followed in the contentions of the parties in the Pre-Trial Order (App. pp. 45-57) and was orally argued to the jury at the conclusion of the trial (App. p. 470) prior to the Trial Judge giving his instructions.

It will also be seen that the Trial Judge carefully and clearly explained the different bases of liability under the Federal Employers Liability Act as to the railroad and liability in tort as to International Paper Company and American Motorists Insurance Company. Clear distinctions were made as to which defendants proximate cause applied and as to which defendants it did not.

Certainly no error can be found or shown in this case.

In fact the evidence preponderates in favor of these defendants.

In summary, the judgment rendered in this case as to these defendants should certainly be affirmed. Even the Questions Presented by plaintiff refer only to alleged errors as regards the railroad. Neither of those questions has to do with error pertaining to these defendants against whom plaintiff's claim is in tort only.

CONCLUSION

Defendants, International Paper Company and American Motorists Insurance Company, pray that the petition of plaintiff herein for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 73-1421

JESSE L. SMITH, PETITIONER

versus

ILLINOIS CENTRAL RAILROAD COMPANY, INTERNATIONAL PAPER COMPANY, and AMERICAN MOTORISTS INSURANCE COMPANY

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Attorneys for Jesse L. Smith, Petitioner

Franklin Press, Inc. Baton Rouge, La.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Your petitioner, Jesse L. Smith, respectfully requests that the Court reconsider its order denying his Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, in the above entitled cause, entered in this cause on May 13, 1974, and grant the Petition.

As grounds for this Petition, Petitioner requests the Court's consideration of the following grounds:

1. The decision below is in direct conflict with this Court's decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), in which this Court held that under the Federal Employers Liability Act, 45 U.S.C. Sec. 51 *et seq.*, a railroad is liable if its negligence played any part, even the slightest, in bringing about the accident.

2. The instruction given herein on unavoidable accident was given at the instance of the trial judge, and was requested by neither defendant. Such instruction was not supported by the evidence, and should not have been given in this action under the Federal Employers Liability Act, *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5 Cir. 1965).

3. A manifest miscarriage of justice has occurred by virtue of the failure of the courts below to apply the controlling principles of law pertaining to suits brought under the Federal Employers Liability Act which will substantially diminish the rights of other litigants invoking this statute.

CONCLUSION

For the reasons set forth in this Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

H. Alva Brumfield, III
509 St. Louis Street
P. O. Box 1486
Baton Rouge, Louisiana 70821
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I, H. Alva Brumfield, III, counsel for the above-named appellant, do hereby certify that the foregoing petition for rehearing is presented in good and faith and not for delay.

H. Alva Brumfield, III

PROOF OF SERVICE

I, H. Alva Brumfield, III, attorney for petitioner, and a member of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari on Boris F. Navratil, Esquire, of the firm of Breazeale, Sachse & Wilson, 701 Fidelity National Bank Building, Baton Rouge, Louisiana 70801, and Roger M. Fritchie, Esquire, of the firm of Durrett, Hardin, Hunter, Dameron & Fritchie, 614 Louisiana National Bank Building, Baton Rouge, Louisiana 70801, counsel for respondents, by mailing copies in duly addressed envelopes, with first class postage prepaid.

Baton Rouge, Louisiana, this_____day of May, 1974.

H. ALVA BRUMFIELD, III